No. 95-5841

In the Supreme Court of the United States

OCTOBER TERM, 1995

MICHAEL A. WHREN, AND JAMES L. BROWN,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

DREW S. DAYS, III
Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

MICHAEL R. DREEBEN
Deputy Solicitor General

PAUL A. ENGELMAYER
Assistant to the Solicitor General

THOMAS M. GANNON
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

49 pp

QUESTION PRESENTED

Whether the stop of petitioners' vehicle after police officers observed the driver commit traffic violations violated the Fourth Amendment.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases—Continued: Page

Cases—Continued: Page

Cases—Continued: Page

Constitution and statutes:

Miscellaneous:

In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 94-5841

MICHAEL A. WHREN, AND JAMES L. BROWN,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (J.A. 6-19) is reported at 53 F.3d 371.

JURISDICTION

The judgment of the court of appeals was entered on May 12, 1995. A petition for rehearing was denied on July 13, 1995. J.A. 20. The petition for a writ of certiorari was filed on August 31, 1995. The petition for a writ of certiorari was granted on January 5, 1996. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

Following a jury trial in the United States District Court for the District of Columbia, petitioners were convicted of possessing crack cocaine with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1); possessing crack cocaine with the intent to distribute it within 1,000 feet of a school, in violation of 21 U.S.C. 860(a); possessing marijuana, in violation of 21 U.S.C. 844(a); and possessing phencyclidine (PCP), in violation of 21 U.S.C. 844(a). The district court sentenced each petitioner to a total of 168 months' imprisonment, to be followed by a ten-year period of supervised release. Petitioner Whren was also fined $8,800. The court of appeals affirmed petitioners' convictions, but remanded for resentencing. J.A. 6-19.

1. On the evening of June 10, 1993, several District of Columbia plainclothes police officers were patrolling in unmarked cars for drug activity in southeast Washington. J.A. 8. As the officers made a left turn, Officer Soto noticed a Nissan Pathfinder with temporary tags stopped at the intersection. He saw the driver, later identified as petitioner Brown, looking down into the lap of the passenger, petitioner Whren. Soto observed that the Pathfinder remained stopped

at the intersection for more than 20 seconds, obstructing at least one car that was stopped behind it. The officers made a U-turn to follow the Pathfinder. As they did so, petitioners turned without signalling and "sped off quickly" at an "unreasonable speed." *Ibid.*

The officers followed the Pathfinder until it stopped at another intersection, where it was largely boxed in by other cars in front of and behind it and to its right. J.A. 9. The officers pulled up next to the Pathfinder on the driver's side. Officer Soto then approached the driver's side of the Pathfinder, identified himself as a police officer, and told petitioner Brown to put the Pathfinder in park. As Soto was speaking, he saw that Whren was holding two large clear plastic bags of what appeared to be crack cocaine. Soto yelled "C.S.A." to alert the other officers that he had observed a Controlled Substances Act violation. As Soto reached for the driver's side door, petitioner Whren yelled, "pull off, pull off." Whren also pulled the cover from a power window control panel in the passenger door and put one of the large bags into a hidden compartment there. Soto opened the Pathfinder's door, dove across Brown, and grabbed the other bag from Whren's hand. Another officer pinned Brown to the back of the driver's seat. After arresting petitioners, the officers searched the Pathfinder and recovered two tinfoils containing marijuana laced with PCP, a bag of chunky white rocks, and a large white rock of crack cocaine from the hidden compartment in the car door, as well as numerous unused ziplock bags, a portable phone, and personal papers. *Id.* at 9-10.

2. Petitioners moved to suppress the evidence obtained from their car. J.A. 10. At the suppression

hearing, Officer Soto testified that he had stopped the Pathfinder because the driver was "not paying full time and attention to his driving." Soto testified that he had not intended to give the driver a ticket, but that he had wished to ask why the driver was obstructing traffic and why he had sped off, without signalling, in a school area. Soto testified that the decision to stop the Pathfinder was not based on petitioners' "racial profile," but on the driver's actions. The second officer's testimony essentially confirmed Soto's account. Petitioners argued that the officers' stated reasons for the stop were pretextual, and that the stop thus violated the Fourth Amendment because it was made without legally sufficient cause. *Id.* at 10-11.

The district court denied petitioners' motions to suppress. See J.A. 4-5. Although the court noted some minor discrepancies between the testimony of the two arresting officers, it explained that "the facts of the stop were not controverted," and that "[t]here was nothing to really demonstrate that the actions of the officers were contrary to a normal traffic stop." Accepting Soto's testimony, the court concluded that "the government has demonstrated through the evidence presented that the police conduct was appropriate and, therefore, there is no basis to suppress the evidence." *Id.* at 4-5, 10-11.

3. The court of appeals affirmed. J.A. 6-19. Under the Fourth Amendment, the court noted, a traffic stop is a "limited seizure" that must be justified by a showing of probable cause "or, ~~at~~ least, reasonable suspicion based on specific and articulable facts." *Id.* at 14. The court rejected petitioners' argument that, where such a showing has been made, a stop to investigate routine traffic violations is constitution-

ally permissible only if a reasonable police officer *would have* made the same stop in the absence of any other, constitutionally invalid purpose. *Id.* at 14-16. Instead, the court explicitly adopted the rule followed by a majority of other courts of appeals and held that "regardless of whether a police officer subjectively believes that the occupants of an automobile may be engaging in some other illegal behavior, a traffic stop is permissible as long as a reasonable officer in the same circumstances *could have* stopped the car for the suspected traffic violation." *Id.* at 16. The court reasoned that inquiring into whether an officer lawfully "could have" made the traffic stop provides "a more principled method of determining reasonableness" than the "would have" test, because it eliminates any need for a court to inquire into an officer's subjective state of mind, *ibid.*, while at the same time it "provides a principled limitation on abuse of power" by requiring that a stop be supported by "probable cause to believe a traffic violation has occurred or a reasonable suspicion of unlawful conduct based upon articulable facts" (*id.* at 16-17).

Applying that standard to the facts of this case, the court of appeals concluded (J.A. 17-18) that Brown's failure to give "full time and attention" to his driving, his turning without signalling, and his driving away at an unreasonable speed provided the police with "the articulable and specific facts necessary to establish probable cause to stop" petitioners.[1] The court held

---

[1] Petitioners' driving violated three District of Columbia municipal traffic regulations. First, D.C. Mun. Regs. tit. 18, § 2213.4 (1970), provides:

> An operator shall, when operating a vehicle, give full time and attention to the operation of the vehicle.

that it was irrelevant that the officers involved were vice officers who were patrolling for drug offenses, rather than traffic police.[2] The court explained that "whether a stop can be made depends on whether the officers had an objective legal basis for it, not on whether the police department assigned the officer in question the duty of making the stop." *Id.* at 18.[3]

Second, D.C. Mun. Regs. tit. 18, § 2204.3 (1970), provides:

> No person shall turn any vehicle to enter a private road or driveway, or otherwise turn a vehicle from a direct course or move right or left upon a roadway without giving an appropriate signal in the manner provided in this chapter if any other traffic may be affected by the movement.

Finally, D.C. Mun. Regs. tit. 18, § 2200.3 provides:

> No person shall drive a vehicle on a street or highway at a speed greater than is reasonable and prudent under the conditions and having regard to the actual and potential hazards then existing.

[2] On appeal, petitioners relied in part on a local police regulation that provided in pertinent part that non-uniformed officers and officers in unmarked cars should not take traffic enforcement action "except in the case of a violation that is so grave as to pose an immediate threat to the safety of others." See District of Columbia Metropolitan Police Department General Order 303.1(I)(A)(2)(a) (1986). While that general order had been superseded by the time the instant stop occurred, the successor general order is not materially different. See General Order 303.1(I)(A)(2)(a)(4) (1992) (officers not in uniform or in unmarked vehicles "may take [traffic] enforcement action only in the case of a violation that is so grave as to pose an *immediate threat* to the safety of others"). Pet. Br. App. 4a. Petitioners did not rely on the regulation at the suppression hearing, but did question officers about the regulation at trial. See Gov't C.A. Br. 22-23 n.12.

[3] The parties agreed below that 21 U.S.C. 841(a)(1), which proscribes possession of controlled substances with the intent to distribute, describes a lesser offense included within 21 U.S.C. 860(a), which prohibits the same act within 1,000 feet of a school. The court accordingly remanded the case for entry of an amended judgment vacating petitioners' convictions under Section 841(a)(1), and for resentencing on the remaining counts. J.A. 18-19. On remand, the district court vacated the convictions under Section 841(a)(1), and generally reimposed the original sentences on the remaining counts of conviction. The court, however, did not reimpose the $8,800 fine on petitioner Whren. Petitioners' appeals of their sentences on remand have been stayed pending the decision in this case.

SUMMARY OF ARGUMENT

The essential command of the Fourth Amendment is that searches and seizures be reasonable. The reasonableness requirement ordinarily mandates that a search or seizure be based on either probable cause or, in the case of a "investigative stop" that is more limited in scope and duration, reasonable suspicion that an offense has occurred or is occurring. When a police officer has observed a motorist commit a traffic offense, the officer has probable cause to justify a stop. Thus, it is reasonable under the Fourth Amendment for an officer who has observed a traffic offense to stop the automobile, to question the motorist, and to take other action where justified.

Petitioners argue that a traffic stop, even when supported by an observed violation, should nevertheless be held to violate the Fourth Amendment if the officer made the stop as a pretext to investigate the motorist for an offense unrelated to the traffic offense. As the courts of appeals have overwhelmingly recognized, any argument that would evaluate police action based on an officer's subjective motive conflicts with this Court's teaching that the validity of a search or a seizure under the Fourth Amendment "turns on an objective assessment of the officer's

actions in light of the facts and circumstances confronting him at the time," not on the officer's state of mind at the time the challenged action was taken. *Maryland* v. *Macon*, 472 U.S. 463, 470-471 (1985). In light of that principle, this Court has held that an officer's motives or intent are irrelevant in a variety of Fourth Amendment contexts. And, while the Court has in some settings required police conduct to conform to internal standards or routines to satisfy the Fourth Amendment, the need to observe such internal standards has been required as an *alternative* to a showing of individualized suspicion; it has never been applied as an *additional* requirement when the police have met the standard of probable cause or reasonable suspicion.

Petitioners accordingly disavow the suggestion that "pretext" stops should be evaluated by probing an officer's subjective intent. But the theoretically objective test of "pretext" they propose is equally flawed. Petitioners' test would invalidate a stop if a reasonable police officer "would not" have made it as a matter of departmental policy or practice. Such a supposed policy or practice, however, would often consist of nothing more than the amalgam of subjective views expressed by different police officers about what each regards as standard practice. And, since a "usual police practice" of not enforcing a particular violation does not alter the fact that the violation *is* illegal under the jurisdiction's traffic laws, it is difficult to see why an officer's departure from "usual practice" would be relevant to the legality of a stop at all *except* as a means for ferreting out an improper pretextual motive. In any event, petitioners' test would not produce consistent results. Identical stops would still yield different results

under the Fourth Amendment if they were made by officers whose police departments had different enforcement priorities.

There is no sound reason for requiring more than the usual Fourth Amendment showing of reasonable suspicion or probable cause in the context of traffic stops. A motorist who commits a traffic offense cannot ordinarily expect that law enforcement officers will overlook the violation, and the prospect of a traffic stop poses only a modest intrusion on the motorist's privacy interests. The Fourth Amendment requirement of reasonableness further limits the scope of permissible activity once the officer has made the stop. And it is unnecessary to alter established Fourth Amendment principles to prevent officers from selectively targeting motorists on account of their race, ethnicity, or exercise of protected rights, for such conduct is already unlawful under the Equal Protection Clause. As for petitioners' claim that the abundance of "technical" traffic regulations (Br. 13) affords too many opportunities for officers to enforce the law, that claim is properly addressed to the political branches that have designated such conduct as a traffic infraction.

Finally, petitioners' test of "pretext" is unworkable. While police departments may for their own purposes establish general policies and enforcement priorities, they rarely would issue a clear mandate never to enforce a particular violation. Courts would thus be obliged to evaluate what "usual practices" were, an inquiry that would often entail taking testimony from multiple officers in the department and then extrapolating from their experience to derive a general policy. And officers in the field, who must often make split-second judgments as to what

action to take, would be left to conjecture, after observing a traffic offense or offenses, whether stopping the motorist would later be held by a court to have conformed to internal regulations setting enforcement priorities or to "usual police practices." In light of those and other problems, the two circuit courts to apply petitioners' proposed test have, in practice, based their decisions on the state of mind of the individual officer who made the stop. Yet such an inquiry into an officer's state of mind is precisely what petitioners' "objective" test purports to avoid.

Petitioners' reliance on an internal police regulation as a gauge of "usual police practices" is particularly inappropriate in this case, because the regulation they cite merely allocates enforcement duties among members of the department. The department has made clear that it enforces the three traffic offenses that petitioners committed; the officers who made the stop were statutorily authorized to do so; and the identity of the particular officer who made the stop has no relation to the issue of whether the stop was justified. The proper inquiry is therefore simply whether the officer who made the stop knew of articulable facts that justified a belief that an offense had been committed. That test was met in this case.

ARGUMENT

THE FOURTH AMENDMENT PERMITS A POLICE OFFICER WHO WITNESSES A TRAFFIC VIOLATION TO STOP THE MOTORIST'S VEHICLE

The essential requirement of the Fourth Amendment is that searches and seizures be reasonable. The reasonableness requirement ordinarily demands that a search or seizure be justified at its inception by a showing of probable cause, or, in the case of a more

limited "investigative stop," by reasonable suspicion, based on specific and articulable facts, that unlawful conduct has occurred or is occurring. *United States* v. *Sokolow*, 490 U.S. 1, 7 (1989); *Reid* v. *Georgia*, 448 U.S. 438, 440 (1980) (per curiam); *Terry* v. *Ohio*, 392 U.S. 1 (1968). The scope of a search or seizure and the manner in which it is conducted must also be reasonable. *Terry*, 392 U.S. at 19-20; *Maryland* v. *Garrison*, 480 U.S. 79, 84 (1987); *Tennessee* v. *Garner*, 471 U.S. 1, 7-8 (1985); *Florida* v. *Royer*, 460 U.S. 491, 500 (1983).

As this Court has long held, those standards apply to a seizure that takes the form of a traffic stop of an automobile and the temporary detention of its occupants. Such a seizure may take the form of an investigative stop and thus may be initiated upon a showing of reasonable suspicion to believe that an offense has been committed. See, *e.g.*, *United States* v. *Hensley*, 469 U.S. 221, 226 (1985); *United States* v. *Cortez*, 449 U.S. 411, 417-418 (1980); *Delaware* v. *Prouse*, 440 U.S. 648, 653-654, 663 (1979); *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 880-884 (1975).[4] Where an officer has observed a traffic viola-

[4] An automobile may also be stopped absent a showing of reasonable suspicion pursuant to a reasonable regulatory program under which the decision to make a stop is dictated by neutral criteria. *Brown* v. *Texas*, 443 U.S. 47, 51 (1979). See *Michigan Dep't of State Police* v. *Sitz*, 496 U.S. 444, 454-455 (1990) (upholding use of sobriety checkpoints); *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 556-558 (1976) (upholding checkpoint stops by Border Patrol to check for illegal aliens on roads leading from Mexican border); see also *Prouse*, 440 U.S. at 663 (invalidating discretionary stops of vehicles not based upon reasonable suspicion); *Brignoni-Ponce*, 422 U.S. at 882-884 (invalidating random stops near Mexican border not based on reasonable suspicion).

tion, the standard of probable cause is met. See, *e.g.*, *New York* v. *Class*, 475 U.S. 106, 117-118 (1986) (stop of car for speeding and cracked windshield); *id.* at 125 (opinion of Brennan, J.); *Pennsylvania* v. *Mimms*, 434 U.S. 106, 109 (1977) (per curiam) (stop of car bearing expired license tags); see also *Prouse*, 440 U.S. at 659; *South Dakota* v. *Opperman*, 428 U.S. 364, 368 (1976).

Petitioners ask this Court to adopt an additional standard of justification that, apparently, would be unique to traffic-stop cases. They propose that a traffic stop based upon an observed traffic violation, even if reasonably limited in scope and manner, should nonetheless be held unreasonable where the stop was "pretextual" (Br. 15)—that is, motivated not by a desire to enforce the traffic laws, but by a desire to investigate the motorist for some other offense. They assert that pretext should be measured in light of whether a reasonable officer would have made the traffic stop in question, in the absence of suspicions of other wrongdoing. The Fourth Amendment, however, does not require a showing above and beyond probable cause or reasonable suspicion to justify a stop of a motorist for a traffic offense. Accordingly, and as a substantial majority of the courts of appeals have concluded, petitioners' proposed "pretext" rule should be rejected.[5]

---

[5] Nine circuits have held that where an officer reasonably suspects or has probable cause to believe that a traffic offense has occurred or is occurring, the Fourth Amendment permits a traffic stop. See, *e.g.*, *United States* v. *Mitchell*, 951 F.2d 1291, 1295 (D.C. Cir. 1991), cert. denied, 504 U.S. 924 (1992); *United States* v. *Scopo*, 19 F.3d 777, 782-784 (2d Cir.), cert. denied, 115 S. Ct. 207 (1994); *United States* v. *Johnson*, 63 F.3d 242, 245-247 (3d Cir. 1995), petition for cert. pending, No. 95-6724 (filed Nov. 13, 1995); *United States* v. *Jeffus*, 22 F.3d 554, 556-557 (4th Cir. 1994); *United States* v. *Causey*, 834 F.2d 1179, 1185 (5th Cir. 1987) (en banc); *United States* v. *Ferguson*, 8 F.3d 385, 391 (6th Cir. 1993) (en banc), cert. denied, 115 S. Ct. 97 (1994); *United States* v. *Trigg*, 925 F.2d 1064, 1065 (7th Cir.), cert. denied, 502 U.S. 962 (1991); *United States* v. *Meyers*, 990 F.2d 1083, 1085 (8th Cir. 1993); *United States* v. *Botero-Ospina*, 71 F.3d 783, 787 (10th Cir. 1995) (en banc) (overruling *United States* v. *Guzman*, 864 F.2d 1512, 1517 (10th Cir. 1988)), petition for cert. pending, No. 95-8121 (filed Mar. 1, 1996). The same approach has been taken by a number of state courts of last resort. See, *e.g. State* v. *Lopez*, 873 P.2d 1127, 1137 (Utah 1994) (collecting cases). The Ninth and Eleventh Circuits, however, have held that a stop is reasonable only where "under the same circumstances a reasonable officer *would* have made the stop in the absence of the invalid purpose.'" *United States* v. *Valdez*, 931 F.2d 1448, 1450 (11th Cir. 1991) (quoting *United States* v. *Smith*, 799 F.2d 704, 709 (11th Cir. 1986)); *United States* v. *Cannon*, 29 F.3d 472, 474-476 (9th Cir. 1994).

A. The Validity Of A Fourth Amendment Intrusion Is Properly Judged Against An Objective Standard Of Reasonableness, And Where A Search Or Seizure Is Supported By Probable Cause Or Reasonable Suspicion, There is No Basis For Inquiring Whether The Decision To Undertake The Search Conformed To Internal Police Practices

1. As this Court has consistently held, the validity of a search or a seizure under the Fourth Amendment "turns on an objective assessment of the officer's actions in light of the facts and circumstances confronting him at the time," not on the officer's state of mind at the time the challenged action was taken. *Maryland* v. *Macon*, 472 U.S. 463, 470-471 (1985) (quoting *Scott* v. *United States*, 436 U.S. 128, 136 (1978)). Based on that principle, the Court has held that an officer's motivation, intent, or under-

standing of the law is irrelevant in a variety of Fourth Amendment contexts. Those include the scope of a defendant's consent to a search, *Florida* v. *Jimeno*, 500 U.S. 248, 250-252 (1991); the scope of the "plain view" doctrine, *Horton* v. *California*, 496 U.S. 128, 138 (1990); the amount of force that may reasonably be used in making an arrest, *Graham* v. *Connor*, 490 U.S. 386, 397-399 (1989); the existence of a Fourth Amendment "seizure," *Macon*, 472 U.S. at 470-471; and the reasonableness of an officer's decision to board a vessel for document inspection, *United States* v. *Villamonte-Marquez*, 462 U.S. 579, 584 n.3 (1983). See *Terry*, 392 U.S. at 21 (in analyzing the reasonableness of a search or seizure, "it is imperative that the facts be judged against an objective standard").

Application of objective standards of conduct promotes the important interest in "evenhanded law enforcement." *Horton*, 496 U.S. at 138. The rights of persons subjected to identical official conduct should not turn on the happenstance of the state of mind of the officer. Because the ultimate Fourth Amendment question is whether the law enforcement interests at stake justify the particular intrusion on privacy interests, the subjective good faith or bad faith of the particular searching officer is not the proper test. Accordingly, "the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action so long as the circumstances, viewed objectively, justify that action." *Scott*, 436 U.S. at 138.

Measuring the validity of a search or seizure by an officer's subjective intent would lead to incongruous results. The traffic stop setting illustrates that

point. If two motorists are stopped in identical fashion for committing the same traffic offense, it would make little sense to judge the constitutionality of the stops differently because one officer's motives were proper and the other's were not. The objective approach that this Court has applied avoids such inconsistencies.[6]

2. There is no exception to the Fourth Amendment's focus exclusively on objective circumstances simply because a search or seizure is challenged as a "pretextual use of governmental authority." Pet. Br. 30. An inquiry into whether an officer's action was "pretextual" is inherently an inquiry into his subjective intent. See *Webster's Third New Int'l Dic-*

---

[6] The Court explained that point in *Horton* v. *California*, *supra*, in rejecting the argument that the "plain view" doctrine should apply only to items that the officer did not expect to discover at the time he applied for a search warrant:

> "Let us suppose officers secure a warrant to search a house for a rifle. While staying well within the range of a rifle search, they discover two photographs of the murder victim, both in plain sight in the bedroom. Assume also that the discovery of the one photograph was inadvertent but finding the other was anticipated. The [inadvertence inquiry] would permit the seizure of only one of the photographs. But in terms of the 'minor' peril to Fourth Amendment values there is surely no difference between these two photographs: the interference with possession is the same in each case and the officers' appraisal of the photograph they expected to see is no less reliable than their judgment about the other. And in both situations the actual inconvenience and danger to evidence remain identical if the officers must depart and secure a warrant."

496 U.S. at 139 (quoting *Coolidge* v. *New Hampshire*, 403 U.S. 443, 516 (1971) (White, J., concurring in part and dissenting in part)).

tionary (1971) (defining "pretext" as "a purpose or motive alleged or an appearance assumed in order to cloak the real intention or state of affairs"). Basing Fourth Amendment analysis on the presence or absence of an official motivation would interfere with the goal of evenhanded law enforcement, and it cannot be reconciled with this Court's cases. See *Graham*, 490 U.S. at 397 ("An officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable [action]; nor will an officer's good intentions make an objectively unreasonable [action] constitutional.").

3. There is also no requirement that an officer's actions must conform to internal police practices or protocols where the action is otherwise justified under normal Fourth Amendment principles. Petitioners assert (Br. 36) that "this Court's Fourth Amendment decisions have repeatedly turned on whether standard police procedures were followed." The decisions on which petitioners rely (Br. 30-36), however, principally involve administrative or regulatory searches. Such searches, unlike traffic stops based on observed violations of law, are not justified by articulable facts pertaining to the individual who is subjected to the search. The Court has accordingly held that the initiation and the conduct of such administrative searches must be governed by an external source of standards. See *Florida* v. *Wells*, 495 U.S. 1, 4 (1990) (property inventory procedures); *New York* v. *Burger*, 482 U.S. 691 (1987) (administrative searches of automobile junkyards); *Colorado* v. *Bertine*, 479 U.S. 367, 372 (1987) (property inventory procedures); see also automobile-stop cases cited at note 4, *supra*.

The application of standard procedures in the administrative-search setting avoids the risk of arbitrary police action, which is prevented in other Fourth Amendment contexts by the requirement of individualized suspicion before a search or seizure may be conducted. As the Court has observed, "[i]n those situations in which the balance of interests precludes insistence upon some quantum of individualized suspicion, other safeguards are generally relied upon to assure that the individual's reasonable expectation of privacy is not subject to the discretion of the official in the field." *Delaware* v. *Prouse*, 440 U.S. 648, 654-655 (1979) (per curiam) (internal quotation marks and footnote omitted). The Court has not, however, extended the requirement of internal standards to Fourth Amendment settings in which the decision whether to proceed with a search *is* supported by probable cause or reasonable suspicion. Rather, "the Fourth Amendment requires that a seizure must be based on specific objective facts indicating that society's legitimate interests require the seizure of a particular individual, *or* that the seizure must be carried out pursuant to a plan embodying explicit, neutral limitations upon the conduct of individual officers." *Brown* v. *Texas*, 443 U.S. 47, 51 (1979) (emphasis added). See 1 W. LaFave, *Search and Seizure* § 1.4(e), at 123 (3d ed. 1996) (noting that, in administrative search cases, the Court's inquiry into the use of standardized criteria was based upon "the fact that the enforcement activity in question was being permitted without probable cause focusing upon a particular individual or place," whereas in the

traffic stop situation, "the arrest or search *is* on probable cause").[7]

Petitioners also rely (Br. 33-34) on *United States* v. *Robinson*, 414 U.S. 218 (1973), but *Robinson* does not support a requirement that police must conform to standard internal practices as well as to Fourth Amendment norms. In *Robinson*, the police stopped an automobile whose driver lacked a permit, placed the driver under custodial arrest, and searched the driver's person incident to his arrest. The Court upheld all three actions. While the Court made clear that it had no occasion in *Robinson* to address the situation in which the decision to place a suspect in post-arrest custody "depart[ed] from established police department practice" and was instead "a mere pretext" to permit a search for narcotics incident to arrest, *id.* at 221 n.1, the Court did categorically hold that "[a] custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment." *Id.* at 235. Significantly, the Court also held that a full search incident to a valid arrest is lawful *per se*, regardless of the subjective intent of the search officer. See *id.* at 236 ("it is of no moment that [the officer] did not indicate any sub-

[7] In urging that "this Court has often looked beyond the mere existence of probable cause in evaluating the reasonableness of searches and seizures" (Br. 16), petitioners rely on *Wilson* v. *Arkansas*, 115 S. Ct. 1914 (1995), *Tennessee* v. *Garner*, 471 U.S. 1 (1985), *Winston* v. *Lee*, 470 U.S. 753 (1985), and *Welsh* v. *Wisconsin*, 466 U.S. 740, 754 (1984). Those cases, however, examined the reasonableness of the *manner* in which a properly justified search or seizure was executed. They have no bearing on the distinct question, presented here, of whether a justification beyond individualized suspicion is required to initiate the search or seizure in the first place.

jective fear of the respondent or that he did not himself suspect that respondent was armed").[8]

Gustafson v. *Florida*, 414 U.S. 260 (1973), the companion case to *Robinson*, further undermines the view that an officer's departure from departmental practice is relevant under the Fourth Amendment when a search is otherwise justified. The Court held that a search incident to a lawful arrest is valid even when the police department had "no police regulations which required the officer to take [the defendant] into custody [nor any] police department policies requiring full-scale body searches upon arrest in the field." *Id.* at 263. The existence of departmental policies and regulations, the Court stated, is not "determinative of the constitutional issue," because, under *Robinson*, "the arguable absence of 'evidentiary' purpose for a search incident to a lawful arrest is not controlling." *Id.* at 265.[9]

Finally, *Abel* v. *United States*, 362 U.S. 217 (1960), does not establish a general Fourth Amendment principle to require standard police practices. See Pet. Br. 33. In *Abel*, the Court held that evidence in-

[8] That portion of *Robinson* was cited by this Court in *Scott* v. *United States*, as demonstrating that searches are to be examined "under a standard of objective reasonableness without regard to the underlying intent or motivation of the officers involved." *Scott*, 436 U.S. at 138.

[9] Justice Powell's concurrence in *Robinson* and *Gustafson* noted that "*Gustafson* would have presented a different question if the petitioner could have proved that he was taken into custody only to afford a pretext for a search undertaken for collateral objectives," *Robinson*, 414 U.S. at 438 n.2 (Powell, J.). No other Justice joined Justice Powell's opinion, however, and *Gustafson*'s unqualified holding makes clear that standard police practices are *not* required to justify a custodial arrest.

troduced at Abel's espionage trial had been lawfully obtained during a search incident to his administrative arrest. The arrest had been effected by the Immigration and Naturalization Service (INS) pursuant to an "administrative warrant" grounded on Able's status as a deportable alien. The Court noted that the Federal Bureau of Investigation (FBI) had alerted the INS to Abel's deportable status after it failed to verify its suspicions that Abel was engaged in espionage. 362 U.S. at 220-225. In upholding the arrest over Abel's claim that the arrest had been a "subterfuge" to assist the FBI in its investigation, the Court did emphasize that it was usual practice for the INS both to receive referrals from the FBI and to issue administrative warrants to deportable aliens, and that the INS had therefore acted in good faith, not for an "illegitimate purpose." *Id.* at 226-227. The Court's focus in *Abel* on the regularity of procedures attending the use of the administrative arrest warrant, however, is consistent with this Court's later decisions similarly requiring regularity of procedures to justify other administrative intrusions, see pp. 16-18, *supra*. And to the extent to that *Abel* suggested that subjective "bad faith" or "motive" alone could result in an infringement of Fourth Amendment rights, 362 U.S. at 226, that suggestion has not survived *Scott* and later decisions.[10]

---

[10] The cases cited by amicus American Civil Liberties Union relies (Br. 7-8) are also inapposite. *Texas* v. *Brown*, 460 U.S. 730 (1983), upheld roadblock stops of cars not based on reasonable suspicion, despite the "generalized expectation" of officers that some cars would be found to contain narcotics and paraphernalia. *Id.* at 743 (plurality opinion). The plurality's statement about the absence of pretext (*id.* at 742) merely applied the then-extant "inadvertence" requirement of the plain view doctrine, see *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971), which was overruled by this Court in *Horton*, *supra*. See note 6, *supra*; *Brown*, 460 U.S. at 744 (opinion of White, J.). *Steagald* v. *United States*, 451 U.S. 204 (1981), held that officers may not use an arrest warrant to search the home of a third party without a search warrant for that home. While that rule was adopted in part to eliminate the possibility of pretextual use of an arrest warrant to enter homes that the officers lacked probable cause to search, *Steagald* did not countenance case-specific inquiries into police motivation nor require compliance with standard police procedures—other than the textual requirement of the Warrant Clause. See 451 U.S. at 215. *Jones* v. *United States*, 357 U.S. 493 (1958), held that a warrantless entry into a home to conduct a search is unlawful absent a recognized exception to the warrant requirement. The Court declined to consider the government's alternative theory on appeal, *i.e.*, that the search was a lawful incident to the defendant's lawful warrantless arrest, explaining that that theory was not supported by the testimony of the officers as to their purpose for entering the home. *Id.* at 499-500. The Court's statement is less an articulation of Fourth Amendment law than an explanation of why the Court declined to entertain the government's belated claim in *Jones*. Finally, none of these cases supports the ACLU's suggestion (Br. 18) that this Court should expressly permit an "inquiry into motive" in order to determine the "real reason officers act" in the course of a pretext inquiry.

B. A Traffic Stop Based On An Observed Violation Need Not Conform To Standard Police Practice To Satisfy The Fourth Amendment

Petitioners recognize (Br. 30) that an officer's subjective motivation cannot invalidate an otherwise objectively justified Fourth Amendment intrusion. As they concede, "[o]bjectively justified seizures are permissible under the Fourth Amendment without regard to the subjective motivations of the police." *Ibid.* In order to avoid directly asking courts to

inquire into subjective motive, petitioners endorse a pretext test that asks whether an officer's decision to make a stop deviated from the action that a "reasonable" officer, committed solely to enforcing the traffic laws, "would have" taken. Br. 32. They argue that stops are unreasonable "if they deviate so far from standard police practice that a reasonable officer in the same circumstances would not have made the intrusion on the basis asserted." *Ibid.*

Although that inquiry is nominally stated in objective terms, in practice it often would duplicate an inquiry into subjective intent. The "usual practices" of the "reasonable officer" would generally be "simply * * * an aggregation of the subjective intentions of officers in the regions." *United States* v. *Ferguson*, 8 F.3d 385, 391 (6th Cir. 1993), cert. denied, 115 S. Ct. 97 (1994). And pretextual motive would simply be inferred circumstantially from the fact that the officer departed from usual practices of other officers. See *United States* v. *Johnson*, 63 F.3d 242, 247 (3d Cir. 1995); *United States* v. *Scopo*, 19 F.3d 777, 782 (2d Cir.), cert. denied, 115 S. Ct. 207 (1994). Indeed, it is not clear what relevance a departure from standard practices would have except to establish circumstantially the motives of the officer who initiated the search. An internal police policy to enforce a law only under certain circumstances does not modify a jurisdiction's traffic laws. Accordingly, an individual stopped for an infraction in derogation of "standard police practice" has still violated the law. The only conceivable purpose of considering a departure from standard police practice would be to ferret out circumstantially an improper pretextual motive.

In any event, to the extent that recourse to "usual practices" is designed to check arbitrary police ac-

tion, see, *e.g.*, LaFave, *supra*, § 1.4(e), at 124-125, the proposal is unsound. Inferring pretext from an officer's deviation from the traffic-enforcement protocol of his particular department would not eliminate arbitrary disparities. Even setting aside the practical obstacles that would generally attend an effort to establish "usual police practice," those practices would frequently differ precinct to precinct, department to department. Under a "usual practices" approach, a stop for a particular violation would be constitutional when carried out by an officer in a police department whose regular procedure was to enforce all observed traffic violations, but unconstitutional if carried out in identical fashion by an officer in an adjoining jurisdiction whose police department had more specific enforcement priorities. The exposure of a driver to a permissible stop for the identical infraction could change within seconds or minutes as the driver passed through different police jurisdictions. The constitutionality of a traffic stop, however, should not be "'subject to the vagaries of police departments' policies and procedures concerning the kinds of traffic offenses of which they ordinarily do or do not take note.'" *United States* v. *Botero-Ospina*, 71 F.3d 783, 788 (10th Cir. 1995) (en banc) (quoting *Ferguson*, 8 F.3d at 392), petition for cert. pending, No. 95-8121 (filed Mar. 1, 1996); *Scopo*, 19 F.3d at 784.

More fundamentally, it is not necessarily improper for officers, in deciding which traffic offenders to stop, to take into account "collateral" (Br. 38) law enforcement objectives beyond the fact that an offense has been committed. This Court has never held that —within the universe of searches, seizures, and arrests for which probable cause or reasonable suspicion exists—the Fourth Amendment restricts the

allocation of law enforcement resources. On the contrary, in deciding which valid searches, seizures, or arrests to undertake and which to forgo, officers routinely consider such legitimate "collateral" factors as: Is a suspect regarded as a danger to society? Is there a reason to suspect him of engaging in other crimes? Would a search or arrest have special deterrent value? The discretion accorded law enforcement officers among courses of action for which individualized justification exists reflects the fact that the Fourth Amendment's goal of protecting against arbitrary invasions of privacy is vindicated by the finding of probable cause or reasonable suspicion itself. See *Brown*, 443 U.S. at 51; *Prouse*, 440 U.S. at 661; *Brignoni-Ponce*, 422 U.S. at 883; *Terry*, 392 U.S. at 21; *United States* v. *Trigg*, 925 F.2d 1064, 1065 (7th Cir.), cert. denied, 502 U.S. 962 (1991).[11]

---

[11] In the analogous setting of examining prosecutorial action, the Court has emphasized that law enforcement officials have "broad discretion," *Wayte* v. *United States*, 470 U.S. 598, 607 (1985), provided that charges are not brought on the basis of constitutionally impermissible factors such as race, religion, or the exercise of a legally protected right. *Id.* at 608. As the Court has noted, "[s]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion." *Id.* at 607 (quoting *Bordenkircher* v. *Hayes*, 434 U.S. 357, 364 (1978)); see 470 U.S. at 607 (prosecutorial charging decisions may be based, *inter alia*, on "the Government's enforcement priorities and the case's relationship to the Government's overall enforcement plan"); cf. *United States* v. *Choate*, 619 F.2d 21, 23 (9th Cir. 1980) ("It is not irrational in a world where resources do not permit prosecution of every suspected criminal that the government would give high priority to prosecuting those who, in addition to being suspected of tax evasion, were also suspected of other serious offenses.").

In this case, for example, petitioners surmise that the police officers who observed their three offenses were motivated by the belief that a glimpse into their car in the course of a stop might disclose proof of narcotics trafficking, as it in fact did. See Br. 4 (noting officer's testimony that officers were patrolling "a high drug area" with the objective of "find[ing] narcotics activity going on"). But, once reasonable suspicion of an offense existed, it would not have been unreasonable to act on that belief. On the contrary, it would be unreasonable to forbid a police department from focusing its finite resources disproportionately on those observed traffic offenders whom officers in the field suspect may also be engaged in more serious offenses. See *United States* v. *Cummins*, 920 F.2d 498, 501 (8th Cir. 1990), cert. denied, 502 U.S. 962 (1991). Indeed, it may well be that, like a pedestrian drug courier, a motorist engaged in narcotics dealing is more prone than an innocent traveler to engage in "evasive and erratic" behavior that manifests itself in traffic infractions. See *Sokolow*, 490 U.S. at 8.

C. There Is No Need For A Heightened Fourth Amendment Standard Of Justification In Cases Involving Traffic Stops

Petitioners argue that a heightened Fourth Amendment standard is needed in the traffic-stop context because, they assert, without such a standard, police officers would be free, "despotically and capriciously" (Br. 17), to violate motorists' privacy. Petitioners' proposed departure from usual Fourth Amendment standards is not justified in this setting.

1. As this Court has repeatedly recognized in finding the reasonable suspicion standard applicable to traffic stops, a properly conducted traffic stop represents a relatively limited intrusion into privacy. "[T]he physical characteristics of an automobile and its use result in a lessened expectation of privacy therein." *New York* v. *Class*, 475 U.S. at 112. Moreover, because "automobiles are justifiably the subject of pervasive regulation by the State[,] [e]very operator of a motor vehicle must expect that the State, in enforcing its regulations, will intrude to some extent upon that operator's privacy." *Id.* at 113; see *California* v. *Carney*, 471 U.S. 386, 392 (1985) ("the public is fully aware that it is accorded less privacy in its automobiles because of this compelling governmental need for regulation").

A motorist who commits a traffic infraction has even less of an expectation of privacy. See *Class*, 475 U.S. at 113. Motorists are aware that, "[a]s an everyday occurrence, police stop and examine vehicles when license plates or inspection stickers have expired, or if other violations, such as exhaust fumes or excessive noise, are noted, or if headlights or other safety equipment are not in proper working order." *Opperman*, 428 U.S. at 368. "The foremost method of enforcing traffic and vehicle safety regulations * * * is acting upon observed violations. Vehicle stops for traffic violations occur countless times each day." *Prouse*, 440 U.S. at 659; *id.* at 658 (noting that States have a "vital interest" in enforcement of motor vehicle laws).

In addition, the Fourth Amendment's reasonableness requirement limits the actions an officer may take upon making a traffic stop. The officer is permitted to direct the motorist to exit the car, *Mimms*,

434 U.S. at 111 & n.6, to inspect the car's vehicle identification number, *Class*, 475 U.S. at 113-114, to inspect the motorist's license and registration, *Prouse*, 440 U.S. at 659, and to question the motorist in moderation about his identity, his license and registration, and the violation. *Berkemer* v. *McCarty*, 468 U.S. 420, 437, 439 & n.29 (1984). The officer may also observe items in plain view, as occurred in this case. But " 'the stop and inquiry must be reasonably related in scope to the justification for their initiation,' " *id.* at 439 (quoting *Brignoni-Ponce*, 422 U.S. at 881), and further significant intrusions require additional justification. See, *e.g.*, *United States* v. *Ross*, 456 U.S. 798, 808-809 (1982) (search of automobile and containers within it requires a showing of probable cause to believe that contraband may be found); *Michigan* v. *Long*, 463 U.S. 1032, 1049 (1983) (protective search of automobile for weapons requires a showing of reasonable suspicion); cf. *New York* v. *Belton*, 453 U.S. 454, 460-461 (1981) (search of passenger compartment for weapons may be made upon a probable-cause arrest of the occupants).[12]

2. Petitioners and their amici also assert (Br. 22-27; ACLU Br. 3-4, 8-9) that allowing traffic stops to proceed upon a showing of reasonable suspicion or probable cause alone would give officers "carte

---

[12] This Court will examine one aspect of the Fourth Amendment's requirements in a traffic stop case next Term in *Ohio* v. *Robinette*, cert. granted, No. 95-891, (Mar. 4, 1996). The petition in that case presents the question whether the Fourth Amendment requires an officer who has validly stopped a motorist for a traffic stop to inform the motorist that he is free to leave before questioning by the officer, unrelated to the original traffic stop, may be found to be consensual. 95-891 Pet. at i.

blanche" (Br. 22) to detain and harass motorists on account of their race, ethnicity, or protected rights. Any decision to single out a suspect or suspects on the basis of such factors, however, would be unlawful under the Equal Protection Clause. See *Yick Wo* v. *Hopkins*, 118 U.S. 356, 373-374 (1886); *United States* v. *Travis*, 62 F.3d 170, 173 (6th Cir. 1995). As Chief Judge Newman of the Second Circuit has explained in holding that traffic stops based upon reasonable suspicion comport with the Fourth Amendment, "the Equal Protection Clause has sufficient vitality to curb most of the abuses that the [defendant] apprehends. Police officers who misuse the authority we approve today may expect to be defendants in civil suits seeking substantial damages for discriminatory enforcement of the law." *Scopo*, 19 F.3d at 786.

Indeed, this Court rejected a similar argument to petitioners' in *Terry* v. *Ohio*, *supra*. *Terry* recognized that minority groups had often claimed that some elements of the police harassed them during street stops. The Court held, however, that the existence of such abuses did not justify "a rigid and unthinking application of the exclusionary rule" to evidence obtained from such stops, for such a result "may exact a high toll in human injury and frustration of attempts to prevent crime." 392 U.S. at 15. Instead, the legality of a stop under the Fourth Amendment turned upon "objective evidentiary justification" for the particular stops. *Ibid.* The Court emphasized that its "approval of legitimate and restrained investigative conduct undertaken on the basis of ample factual justification should in no way discourage the employment of other remedies than the exclusionary rule to curtail abuses for which that sanction may prove inadequate." *Ibid.*

3. Finally, petitioners assert that an inquiry into pretext is needed to deny officers the discretion to stop motorists for "technical" (Br. 13) or "nitpicking" (Br. 20) traffic offenses. See Br. 13 ("a tire touching the shoulder stripe, a lane change signal a moment too brief"). That argument, at bottom, contests the decision by States and localities to designate such conduct as an enforceable infraction. The same argument could be made by defendants stopped or arrested for non-traffic offenses that they regard as trifling, such as various misdemeanors. If petitioners believe that the traffic laws in a jurisdiction punish inconsequential lapses, or that such misconduct should be enforced in a manner other than through traffic stops, their recourse is through the political process. See *Ferguson*, 8 F.3d at 391.[13]

D. A Standard That Turns On Whether A Reasonable Officer "Would Have" Made The Traffic Stop Is Not Workable

A final flaw in petitioners' proposed test of pretext is that it is unworkable. Petitioners would inquire whether a reasonable officer motivated solely by a desire to enforce the traffic laws "would have" made the stop—in other words, whether it was "usual practice" to make such a traffic stop. Br. 32. "Usual practice" would be determined with reference to internal police regulations governing the traffic

---

[13] Compare C. Whitebread & C. Slobogin, *Criminal Procedure* § 6.02, at 168 & nn.8-9 (3d ed. 1993) (noting that, following the decisions in *Robinson*, *supra*, and *Gustafson*, *supra*, several state legislatures reduced certain violations of their traffic codes to infraction status, thus preventing operation of the search incident to arrest doctrine, which requires a custodial arrest).

offense, or, where no regulation existed, by determining what action a reasonable police officer would have taken under the circumstances. Br. 32-33, 41-42; ACLU Br. 15. As the courts of appeals have overwhelmingly concluded, see note 5, *supra*, that test is difficult to apply, produces inconsistent results, and provides uncertain guidance to officers in the field.

1. Petitioners' test of pretext would require, as a threshold inquiry, a determination of what "usual practices" were with regard to the traffic offense that supported the particular stop. That determination would presumably be made at the level of the police department (see Br. 41-42), because inquiring whether the officer had deviated from his own "usual practices" would entail exploring the officer's own subjective intent in making and forgoing stops for the same offense in the past, and because inquiring into police practices on a larger scale would both be impractical and at odds with the fact that traffic enforcement policies are generally set at the departmental level.

There is, however, no reason to assume that police departments commonly maintain regulations that direct that particular traffic laws either not be enforced or be enforced only under certain circumstances.[14] It is also unrealistic to assume, as petitioners appear to concede (Br. 24), that departments maintain records of how often the observation of a particular traffic offense results in a stop. Even if such records existed, it would be impossible to know what share of those stops had been influenced by

[14] Nor does petitioners' reliance on an internal police regulation in this case provide a workable solution to that problem. See pp. 36-38, *infra*.

"pretextual" motivations. Thus, except where an internal regulation clearly directed that an infraction not be enforced, a court seeking to determine a department's "usual practices" with regard to that infraction would either have to rely on the court's own notions of whether enforcement of a particular infraction would be reasonable, or receive testimony from other officers as to their usual practices with regard to the offense.[15]

Such an inquiry would not only be cumbersome, but, as an aggregation of the subjective intentions of multiple officers, it would be no more reliable than inquiring into the state of mind of a single officer.[16] Moreover, for such an exercise to have value, the court's inquiry would have to consider the circumstances under which the traffic offense occurred: Did weather, lighting, traffic, or road conditions render the offense more worthy of enforcement than in the typical case? It is unrealistic to expect such an analysis to be developed at a suppression hearing. Even if it were feasible to ascertain how often a department had enforced a particular traffic offense

[15] Even where a department had clearly directed officers not to enforce an offense, revelation of that enforcement policy could undermine police effectiveness in ensuring traffic safety. For example, disclosure of a policy of only stopping motorists who drive 10 miles per hour or more above the speed limit could undermine the speed limit's deterrent effect on motorists who exceed the speed limit by less than 10 miles per hour.

[16] As petitioners acknowledge (Br. 31), " '[s]ending state and federal courts on an expedition into the minds of police officers would produce a grave and fruitless misallocation of resources' " (citation omitted). See LaFave, *supra*, §1.4(e), at 124 ("there is no reason to believe that courts can with any degree of success determine in which instances the police had an ulterior motive").

under similar circumstances, there is no ready guide to determine at what point the enforcement of that offense departed from "usual police practice." Suppose, for example, that a department stops motorists for a particular violation less than 50% of the time. Presumably, under petitioners' test, any stop for that offense is a deviation from the norm, and thus unconstitutional. The same result would follow even if the Fourth Amendment standard for a "usual" police practice were drawn at, for example, a 10% enforcement rate: any stop made by a police department that enforced a particular violation more rarely would be unlawful. Petitioners confine their discussion to the hypothetical situation in which an internal regulation categorically forbids enforcement (Br. 32, 41-42), and do not say, outside of that situation, what level of enforcement would make an otherwise lawful traffic stop "unusual."

Adoption of petitioners' test would therefore result in arbitrary disparities among subjects of searches and seizures. A traffic stop that was unconstitutional if made by one police department would be lawful if conducted by another, depending on internal regulations or the relative incidence of stops for that offense by the two departments. And a department that wished to minimize the possibility of having its traffic stops invalidated would be well-advised to dispense with internal prohibitions on enforcement altogether. See *United States* v. *Caceres*, 440 U.S. 741, 755-756 (1979) (declining to apply exclusionary rule to "every regulatory violation" because of the possibility that that sanction would have "a serious deterrent impact on the formulation of additional standards to govern prosecutorial and police procedures").

2. For officers in the field, who must often make split-second decisions as to what course of action to undertake, such a regime would be both unpredictable and confusing. Except where departmental regulations unambiguously mandated or forbade stops for a given traffic offense, officers would not know, when they see a violation, whether a court would later hold that stopping the motorist conformed to internal regulations or "usual police practices." To make the constitutionality of a stop turn on whether an officer has correctly analyzed how a potentially vague or general internal regulation applies to the situation at hand would "complicat[e] the thought processes and the on-the-scene judgments of police officers," who instead should be "free to follow their legitimate instincts when confronting situations presenting a danger to the public safety." *New York* v. *Quarles*, 467 U.S. 649, 659 (1984).

When an officer is free to initiate a traffic stop upon a showing of reasonable suspicion or probable cause, the officer is guided by a familiar standard that is ultimately subject to testing in court under a well-developed body of law. The officer knows that he must articulate specific facts to justify the intrusion in question. While it may be desirable for police departments to adopt additional regulations, either to promote regularity of action or to establish law enforcement priorities, such regulations, by themselves, normally afford no basis for the remedy of suppression of evidence in a criminal case. See *United States* v. *Caceres*, *supra* (refusing to suppress evidence obtained from consensual electronic surveillance, despite acknowledged violation of administrative regulations that mandated prior authorization by senior officials). When an officer has a basis to be-

lieve that a motorist has violated the traffic laws, the officer's misapplication of an internal regulation provides no justification for immunizing the motorist from criminal liability.

3. The unworkability of petitioners' "would have" test is illustrated by the experiences of the Ninth and Eleventh Circuits, the two circuits that presently apply that test. In practice, both circuits have based their decisions not on departmental regulations or enforcement patterns, but on the state of mind of the officer who made the stop. See, *e.g.*, *United States* v. *Cannon*, 29 F.3d 472, 476 (9th Cir. 1994) (upholding stop based on the fact that officer had been told by colleagues that defendant did not have a driver's license; no inquiry made into whether officers generally made stops for that offense); *United States* v. *Valdez*, 931 F.2d 1448, 1451 (11th Cir. 1991) (holding that stop was unreasonably pretextual based on testimony of patrol officer that he pulled over defendant for weaving into the emergency lane after being advised that narcotics unit wanted car stopped); *United States* v. *Smith*, 799 F.2d 704, 710 (11th Cir. 1986) (holding that stop was unreasonably pretextual based on evidence of officer's lack of interest in investigating drunk-driving charges). See *Ferguson*, 8 F.3d at 391. Yet consideration of a particular officer's subjective motivations is precisely what petitioners purport to avoid (Br. 32) by using an "objective" measure of pretext. If the departments whose officers made the stops at issue in *Valdez* and *Smith* "usually" enforced the laws against interlane weaving and drunk-driving, respectively, then under petitioner's "would have" test, those stops should have been upheld.

Based largely on such practical considerations, the en banc Tenth Circuit recently reconsidered the "would have" standard, which it had sought to apply in traffic stop cases between 1988 and 1995, and abandoned that standard. See *Botero-Ospina*, 71 F.3d at 787 (overruling *United States* v. *Guzman*, 864 F.2d 1512, 1517 (10th Cir. 1988)). The court noted that its application of the "would have" test had been "inconsistent and sporadic" and that that test had proven unworkable. 71 F.3d at 786. At times, the court observed, it had measured the stop against the practices of an entire State's police force, see *Guzman*, 864 F.2d at 1518) (New Mexico); at other times, against the practices of a particular unit within a state highway patrol, see *United States* v. *Fernandez*, 18 F.3d 874, 877 (10th Cir. 1994) (part of Utah Highway Patrol); and at still others, against the practices of the individual officer, see, *e.g.*, *United States* v. *Harris*, 995 F.2d 1004, 1006 (10th Cir. 1993). *Botero-Ospina*, 71 F.3d at 786. Moreover, the court found, the "would have" test had not invalidated any traffic stop that would have been sustained under the traditional inquiry into whether the stop was supported by reasonable suspicion. *Ibid.* The court accordingly held that a traffic stop may be initiated whenever an officer has reasonable suspicion to believe that a traffic or equipment violation has occurred or is occurring, and that it is irrelevant what the motives of the officer making the stop were or whether the stop departed from the department's "general practice" or the officer's routine. *Id.* at 787. The court emphasized that it was not "abandoning the traveling public to 'the arbitrary exercise of discretionary police power,'" because the officer's actions after making the stop must be "related in scope to the

circumstances that justified the interference in the first place." *Id.* at 786, 788 (citations omitted).[17]

4. Petitioners (Br. 41-42) and their amici (ACLU Br. 13-14) claim that "usual practices" would be determined in this case by applying an internal police department regulation, Metropolitan Police Department (MPD) General Order 303.1(I)(A)(2)(a)(4) (1992) (*reprinted* at Pet. Br. Add. 4). The regulation provides that, while "traffic enforcement action" may be taken by other police officers under any circumstances, *id.* at 303.1(I)(A)(2)(a)(1)-(3), such action should be taken by plainclothes officers in unmarked cars "only in the case of a violation that is so grave as to pose an *immediate* threat to the safety of others." *Id.* at 303.1(I)(A)(2)(a)(4).

As an initial matter, a general Fourth Amendment rule in this area should not turn on whether a particular police department has established written procedures to govern particular stops. But as this case illustrates, even such written procedures do not eliminate the malleability of the "usual practices" inquiry. Petitioners offer no reason why "usual police practice" should be determined with reference only to "officers out of uniform in unmarked cars" (Br. 41), rather than the entire police force. The department's regulation does not suggest, and petitioners do not assert, that the policy of the District of Columbia police department is not to enforce the

[17] The en banc Sixth Circuit had earlier adopted the same standard. *United States* v. *Ferguson*, *supra*. In doing so, the court noted that, although its prior decisions had purported to apply the "would have" test endorsed by petitioner, in reality those decisions had inquired only into whether the stop was supported by probable cause or reasonable suspicion. 8 F.3d at 390-391.

violations that petitioners committed. The regulations provide, in fact, to the contrary. See MPD General Order 303.1(III)(B)(1) ("District Commanders shall * * * enforce all traffic regulations."). Nor do petitioners dispute that the officers had statutory authority to make the stop. See D.C. Code Ann. § 23-581(a)(1)(B) (1981 & Supp. 1989) ("A law enforcement officer may arrest, without a warrant having previously been issued therefore[,] * * * a person who he has probable cause to believe has committed or is committing an offense in his presence.").

The regulation on which petitioners rely merely allocates enforcement duties among different officers. It sensibly directs plainclothes officers like Officer Soto not to divert from their important investigative duties except to enforce sufficiently serious traffic offenses. There is no reason why the stop of petitioners' vehicle should be deemed unlawful (and its fruits suppressed) because the officer who was present to observe the offenses was assigned to other enforcement duties. Indeed, under petitioners' analysis, identical stops of motorists for identical offenses would yield different results under the Fourth Amendment if made by officers in the *same* department, simply as a result of the officers' internally assigned responsibilities. See *Johnson*, 63 F.3d at 247 ("It is not apparent why police officers should be precluded from making an otherwise valid traffic stop merely because by doing so they would be departing from some routine"); *Scopo*, 19 F.3d at 783.[18]

[18] Moreover, although petitioners' "would have" test purports to be an objective gauge of "pretext," it would uphold a search by a District of Columbia traffic officer who freely

Furthermore, even if the regulation on which petitioners rely were dispositive of whether the stop conformed to "usual practices," use of that test would have forced Officer Soto to decide, on-the-spot, whether the violations that he had observed would later be held to have posed "an *immediate* threat to the safety of others," MPD General Order 303.1(I)(A)(2)(a)(4), knowing that a mistaken judgment on that issue would have led to the exclusion of evidence. We believe that an officer reasonably could have concluded that turning without signalling and driving at an unreasonable speed in a residential neighborhood at night, singly or together, constituted such a threat to safety. But whatever the proper application of that internal rule to the facts at hand, the risk of overdeterring officers from responding to observed offenses, and the cost of excluding probative evidence, far outweigh any benefit gained by using the Fourth Amendment to insist upon compliance with internal police protocol.

---

admitted that he stopped a car out of a desire to search for narcotics, but it would invalidate an identical search by a undercover vice officer who was purely motivated by a desire to enforce the traffic laws. Compare *Graham*, 490 U.S. at 397; *Scott*, 436 U.S. at 138. Furthermore, it is clear that a District of Columbia narcotics officer could have stopped petitioners' car consistent with the internal regulations, provided that he was in uniform and in a marked police car. See MPD General Order 303.1(I)(A)(2)(a)(1) (1992) (Pet. Br. Add. 4). Thus, petitioners' approach of focusing their "usual practices" analysis on internal assignments within the department would fail to prevent "pretext" stops by some of the very officers whom petitioners would presumably surmise are most likely to be "pretextually" motivated.

E. The Stop Of Petitioners' Automobile Was Lawful, And The Search Was Reasonably Limited In Scope And Manner

In light of the foregoing, the initiation of the traffic stop in this case was reasonable within the meaning of the Fourth Amendment, because the officers had probable cause, based on their own observations, to believe that the driver of the Pathfinder had committed several traffic offenses. Petitioners appear to claim (Br. 44-46), however, that even if the stop itself was justified, it was carried out in an unreasonable manner because it was not conducted by traffic officers, but by plainclothes officers in an unmarked car. That claim lacks merit.[19]

We know of no case to hold unreasonable a stop of a motorist (or a pedestrian) based on reasonable suspicion or probable cause because the officers did not wear clothing or drive in a vehicle that identified them as police. On the contrary, common sense dictates that officers whose identity is not immediately apparent will be more efficacious in observing unlawful conduct in many situations, whether in patrol-

---

[19] It also appears that petitioner's challenge to "*how* [the] seizure was made" (Br. 44) is not properly encompassed within the question presented by the petition for a writ of certiorari. That question is (Pet. i): "Whether a pretextual traffic stop undertaken by officers who were prohibited by police department regulations from making traffic stops was objectively unreasonable under the Fourth Amendment where no reasonable officer in those circumstances *would have* made such a stop (the test used by the Ninth, Tenth, and Eleventh Circuits) or whether such a stop was permissible as long as it *could have* been made because of a traffic violation (the test used by the D.C. Circuit in this case, and the Second, Third, Fourth, Fifth, Sixth, Seventh and Eighth Circuits)."

ling roadways or walking the streets. See, *e.g.*, *Terry*, 392 U.S. at 5-7 (recounting how plainclothes officer observed suspects "case" store). *Prouse*, *supra*, and *Brignoni-Ponce*, *supra*, on which petitioners rely (Br. 44) are inapposite. Those cases invalidated random traffic stops that were not based on reasonable suspicion. While the Court noted that surprise traffic stops represent an intrusion on motorists' Fourth Amendment interests, see *Prouse*, 440 U.S. at 657, the Court emphasized that such traffic stops would have been lawful if made upon a showing of reason to believe "that a motorist is unlicensed * * * or that either the vehicle or an occupant is otherwise subject to seizure for violation of law." *Prouse*, 440 U.S. at 663; *Brignoni-Ponce*, 422 U.S. at 882-884; see also note 4, *supra*. That showing was made in this case.

Also misplaced is petitioners' reliance (Br. 46) on *Wilson* v. *Arkansas*, 115 S. Ct. 1914 (1995). In *Wilson*, this Court held that a police entry into a home to execute a search warrant may be unreasonable if not preceded by an announcement of police entry, based on the long common-law history of requiring police to "knock and announce" before entering a home. *Id.* at 1916. There is no common-law history requiring any form of pre-stop identification by police who stop automobiles, and as the Court has noted, the "physical entry of the home is the chief evil against which the wording of the Fourth Amendment was directed." *Payton* v. *New York*, 445 U.S. 573, 585 (1980) (warrantless entries into the home are prohibited by the

Fourth Amendment absent probable cause and exigent circumstances).[20]

Even if there were some requirement of pre-stop notification of the officers' status, it was established at the suppression hearing that Officer Soto was wearing an orange police armband and a badge, and that he identified himself as a police officer as he approached petitioners' car. Tr. 13-14. The intrusion on petitioners' privacy that followed "was limited and was 'reasonably related in scope to the justification for [its] inception.'" *Cortez*, 449 U.S. at 421 (quoting *Terry*, 392 U.S. at 29)). Officer Soto remained outside the car until he observed cocaine in the front seat, compare *Cortez*, 449 U.S. at 421, and that observation fully justified his entry into the vehicle to retrieve the cocaine and to apprehend petitioners. Compare *United States* v. *Hassan El*, 5 F.3d 726, 731 (4th Cir. 1993).

---

[20] For similar reasons, *Welsh* v. *Wisconsin*, 466 U.S. 740 (1984), on which petitioners also rely (Br. 16, 40), is inapposite. *Welsh* held that officers may not rely on the doctrine of exigent circumstances to enter a home at night without a warrant to make an arrest for a minor traffic offense. As the Court emphasized in *Welsh*, its decision turned on the "special protection afforded the individual in his home under the Fourth Amendment," 466 U.S. at 754, a factor absent here.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

MICHAEL R. DREEBEN
Deputy Solicitor General

PAUL A. ENGELMAYER
Assistant to the Solicitor General

THOMAS M. GANNON
Attorney

MARCH 1996